

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 June 2004

CASE NO.: 2004-AIR-00003

IN THE MATTER OF:

**NICK ROUGAS,
Complainant**

v.

**SOUTHEAST AIRLINES,
Respondent**

APPEARANCES:

**CRAIG L. BERMAN, ESQ.
On behalf of the Complainant**

**MICHAEL V. ABCARIAN, ESQ.
On behalf of the Respondent**

**Before: LARRY W. PRICE
Administrative Law Judge**

DECISION AND ORDER

This matter involves a dispute concerning alleged violations by the Respondent-employer, Southeast Airlines, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 et seq. (AIR21) and the regulations promulgated thereunder at 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or sub-contractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions or privileges of employment because the employee provided to the employer or the federal government information relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration (FAA) or any other provision of federal law related to air carrier safety.

On March 31, 2003, Complainant Nick Rougas filed a complaint with the Department of Labor against Respondent alleging that he was terminated from work in violation of AIR21 in retaliation for raising FAA safety concerns. On September 30, 2003, after conducting an investigation, the Assistant Secretary of Labor for Occupational Safety and Health dismissed Complainant's complaint for lack of merit. On October 28, 2003, Complainant timely filed a request for hearing under 49 U.S.C. 42121(b)(2)(A).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing commenced on March 30, 2004, and closed on March 31, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs¹. The following exhibits were received into evidence:

1. Complainant's Exhibit Numbers 1-9, 12-13 and 15-21;² and
2. Respondent's Exhibit Numbers 1-11.³

Post-hearing briefs were received from both parties⁴.

ISSUES

1. Whether Complainant was engaged in protected activity as described in 49 U.S.C. § 42121;
2. If so, whether such activity was a contributing factor in Respondent's decision to discharge Complainant;
3. If so, whether Respondent has established by clear and convincing evidence that Respondent would have discharged Complainant absent his protected activity.

In addition, Respondent has raised the issue that Complainant's complaint of unlawful suspension is time-barred under AIR21, which requires that a complaint be filed

¹ References to the record are as follows: Transcript: Tr.; Complainant's Exhibits: CX; Respondent's Exhibits: RX; Complainant's Brief: CB; Respondent's Brief: RB.

² Complainant's Exhibit 22, the deposition of Bruce Haseltine, was admitted post-hearing.

³ Respondent's Exhibit 12, the deposition of David Lusk, was admitted post-hearing.

⁴ On June 25, 2004, the Court received Complainant's Motion to Stay. The Court had completed the final draft of this Decision and Order on June 22, 2004. The Court finds there is no compelling reason to stay this proceeding at this late date. Accordingly, the Motion to Stay is **DENIED**.

not later than ninety days after the date on which the alleged violation occurred. Wintrich v. American Airlines, Inc., 2004-AIR-1 (ALJ Dec. 30, 2003) (citing 49 U.S.C. § 42121(b)(1); 29 C.F.R. § 1979.104(d)). Complainant was suspended by Respondent on January 2, 2003. On March 31, 2003, Complainant sent an email complaint to the Whistleblower Protection Program. The complaint specifically mentions Complainant's January 2, 2003 suspension, although he listed the alleged discrimination date as February 14, 2003, the date of his termination. I find that the information contained in the original complaint is sufficient notice of Complainant's intention to argue that he was unlawfully suspended. Since that complaint was filed within the ninety day time period after the date of suspension, I find that the complaint of unlawful suspension is not time-barred under AIR21.

SUMMARY OF THE EVIDENCE

Complainant's Testimony

Complainant is a forty-eight year old college graduate and an ex-Marine. (Tr. 120-21). While in the Marines, Complainant became a helicopter pilot. (Tr. 122). Complainant later served as a flight instructor in the Coast Guard. (Tr. 123). In April 1999, he went to work for Respondent as a first officer on DC-9s. (Tr. 124-25). As a first officer, Complainant was required to assist the captain with paperwork, safety issues and flight preparation. (Tr. 125). During one period of time, Claimant was assigned to fly with Captain Steven Malone on trips out of Nassau. (Tr. 127). According to Complainant, he eventually "tried to stay away from" doing trips with Captain Malone. (Tr. 132-33).

Before 2003, Complainant was never suspended, disciplined, reprimanded or demoted. He became a senior first officer and was entitled to his first choice on bid lines. (Tr. 129). Complainant denied ever telling Jessica Bush, the crew scheduling manager, that he was not going to fly a flight. He noted that he was often called in to cover flights for other pilots. (Tr. 131). Complainant acknowledged that he sought reimbursement from Respondent when he was called in to fly and missed refereeing hockey games. (Tr. 202-03). Complainant felt that it was appropriate for him to be reimbursed for the money he would have earned refereeing these games. (Tr. 203-04). Complainant testified that he did wear bunny ears in the cockpit but was never disciplined for it. (Tr. 127).

Complainant was certified to fly the MD-80 but did not enjoy doing it. (Tr. 134-35). Captain David Lusk, the chief pilot, later moved Complainant back to flying DC-9s. (Tr. 131, 135). Complainant testified that he was qualified for a promotion to captain once he became certified to fly the MD-80. (Tr. 192). According to Complainant, there was a high turnover among Respondent's pilots "because of the way they treat people." (Tr. 192-93).

According to Complainant, Captain Malone, the director of operations, directed flights to take off heavy, meaning that he told pilots to take off even if the plane was carrying more weight than it was certified to carry. (Tr. 131, 135-36). Complainant testified that he heard Captain Malone threaten pilots who refused to take off heavy. (Tr. 136-37). Complainant also stated that Captain Malone told pilots that they had no days off and were always on call, which Complainant felt to be a violation of the "one-in-seven rule." (Tr. 137). Complainant made a complaint to Captain Lusk about this issue but did not know whether Captain Lusk ever investigated the situation. (Tr. 137-40). Complainant also alleged that Captain Malone asked him to purge trip envelopes in preparation for a secret FAA inspection. (Tr. 140-41).

On December 13, 2002, Complainant called in sick for the first time in his tenure with Respondent. He was suffering from stomach problems, aches and fever. (Tr. 145). Although Complainant was on reserve and was not scheduled to fly, the crew schedulers called him several times to see if he was feeling better because he was needed to do a flight. (Tr. 146). Complainant felt that he was being harassed and complained to Captain Lusk. (Tr. 146-47). On December 14, Complainant was feeling a little better and told the schedulers that he might be able to do a small trip if he was needed. (Tr. 147).

On December 16, 2002, the schedulers asked Complainant to do a test flight in Miami, and he agreed. When Complainant arrived in Miami, he learned that the plane was not ready. (Tr. 148). On December 18, Complainant completed the test flight and was told to ferry the plane to Fort Lauderdale for a trip up to Newark and back. (Tr. 149-50). Complainant told the schedulers that he was too sick to do the trip, and Captain Malone told Complainant that he would be fired if he refused the trip. (Tr. 150-51). Captain Malone later retracted the statement but told Complainant he would suffer the consequences of refusing the flight. (Tr. 151). On December 19, Complainant flew from Fort Lauderdale to Newark. The crew scheduler told him that once he returned from Newark to Fort Lauderdale, he would have to catch a flight to Baltimore to do some Baltimore to Aruba flights. Complainant testified that his symptoms had worsened by that time, so he told the scheduler that he would fly the plane back to Fort Lauderdale but was too sick to do any of the other flights. (Tr. 152). From Fort Lauderdale, Complainant returned to his home and made no more flights between that time and his suspension. (Tr. 154).

On December 21, 2002, Complainant called in to see if he was needed, but he was not asked to do any more flights. (Tr. 155). On December 23, Complainant called Jean Robbins in human resources to make sure that he had followed the proper procedures for calling in sick. (Tr. 156). On December 27, Complainant called crew scheduling because he was supposed to fly to Baltimore the next day, but the scheduler told him that everyone thought he was still out on sick leave. The scheduler told Complainant he needed a doctor's note to be released back to service, so Complainant obtained a note from a flight surgeon. (Tr. 145, 157).

On December 30, 2002, Complainant was told that he had been taken off all flight schedules pending a meeting. (Tr. 158). On January 2, 2003, Complainant met with Captain Lusk, who suspended Complainant for two months and had typed up a letter explaining the reasons for the suspension. (Tr. 159). The reasons for suspension included lack of cooperation with scheduling, inappropriate language use on the company radio in October 2002 and poor working attitude with other crew members. (Tr. 160). Complainant testified that before that day, he had never received any counseling on any of those issues. (Tr. 160-61). He explained that in October 2002, he had told the crew scheduler that his schedule “suck[ed]” and that the scheduler had responded with profanity. (Tr. 163-64). Complainant’s impression was that Captain Lusk “seemed reluctant” to discipline him. (Tr. 161). At the meeting, Captain Lusk added a paragraph to the suspension letter giving Complainant permission to appeal the length of the suspension. (Tr. 205-07).

After he was suspended, Complainant contacted Bruce Haseltine, Respondent’s primary operating inspector (POI) with the FAA. He also spoke with OSHA and FAA representatives and wrote a letter to Tom Kolfenbach, Respondent’s president. (Tr. 164). Complainant believed he was suspended in retaliation for bringing up safety issues and talking to the FAA. (Tr. 165). He testified that Captain Malone wanted to take away two months of his seniority after he was suspended and also attempted to charge him for vacation time when he was off schedule. (Tr. 215-16).

On February 7, 2003, Captain Lusk called Complainant back in to work. (Tr. 166). A few days later, Complainant met with Captain Lusk, who told him to meet with Jessica Bush in crew scheduling to work out his flight schedule. (Tr. 167). Complainant testified that he told Captain Lusk that he had made other commitments because he did not expect to be back at work for another few weeks, and Captain Lusk told him that it was not a problem and that the schedulers could work around his other commitments. (Tr. 168). Complainant was in training class for a few days before talking to Ms. Bush about his schedule. (Tr. 167-68). Complainant testified that he had been brought back to fly the DC-9s and that Ms. Bush told him that all of those flights were already covered, although there was a trip available with another plane. (Tr. 168-69). Complainant stated that when he told Ms. Bush that he had commitments on a certain weekend, she told him that it was not a problem because they did not have any flights for him. (Tr. 169). According to Complainant, Ms. Bush never gave him a schedule and told him that the schedule for the month was already written. (Tr. 194).

After Complainant was brought back, he became aware that the FAA was investigating Respondent for complaints filed by employees. (Tr. 170-71). According to Complainant, Captain Malone had stated several times that he knew who was talking to the FAA and that those people would be fired and sued for defamation of character. (Tr. 171). Complainant testified that he last heard Captain Malone say these things after he

was brought back from his suspension. Ms. Robbins then told Complainant that Captain Malone was stepping down as director of operations to return to flying. (Tr. 172). Complainant testified that he told Ms. Robbins that he wished Captain Malone luck but that he and other employees did not want to fly with Captain Malone because of safety concerns. (Tr. 174). Complainant did not view this comment as an attempt to “bad-mouth” Captain Malone but merely an expression of concern. He did not know that another employee, Vicky Vogel, was listening to his conversation with Ms. Robbins. (Tr. 176).

Later that day, Complainant received some phone calls from Captain Malone, who asked him to bring his books and manuals into the office. Complainant took this request to mean that he was going to be fired. (Tr. 177). When Complainant came into the office on February 14, 2003, he was told that he could resign or be fired. He testified that he was fired after he refused to resign but that no one ever told him why he was fired. (Tr. 178). Complainant believed that he was fired in retaliation. (Tr. 177). He acknowledged that he did not know who made the actual decision to terminate his employment. (Tr. 208-09).

After his termination, Complainant learned from Ms. Robbins that the day after their conversation, Captain Malone had come in to ask her to write a letter detailing her conversation with Complainant about him. (Tr. 178). Apparently Ms. Vogel had reported the conversation to Captain Malone. (Tr. 178). About a month after his termination, Complainant asked Ms. Robbins for a copy of the letter detailing the conversation for Captain Malone. Since she did not have a copy, he asked her to write down what she remembered while he was in her office. (Tr. 181). Complainant affirmed that the documents that Ms. Robbins had filled out for Captain Malone and Terry Haglund, Respondent’s general counsel, shortly after the conversation did not mention anything about safety or violations of FAA regulations. (Tr. 46, 200-02). He did not know why the phrase “for safety reasons” appeared to be squeezed in between two lines of the document that Ms. Robbins wrote for him. (Tr. 210-11). He affirmed that this document did not mention anything about FAA violations or protected activity. (Tr. 212). He speculated that Respondent had put pressure on Ms. Robbins not to mention safety concerns in the documents that she wrote for Captain Malone and Mr. Haglund but admitted that he had no evidence of any such coercion. (Tr. 213-15).

Complainant filed a whistleblower complaint through the Department of Labor website. He affirmed that he complained about his suspension in this complaint. (Tr. 183). Complainant denied that he ever asked Rodney Conover, one of Respondent’s captains, to get involved in an action against Respondent. (Tr. 195). He affirmed that the basis of his whistleblower complaint against Respondent was the conversation that he had with Ms. Robbins on February 13, 2003. (Tr. 196-98). Complainant’s responses to Respondent’s interrogatories never indicated that Captain Malone or Captain Lusk were

aware of his whistleblower complaint. (Tr. 198-200). He testified that there are still pilots who would prefer not to fly with Captain Malone. (Tr. 216).

Complainant testified that when he was fired, he was earning about \$3,500 per month. (Tr. 177). He estimated that he earned \$43,600 per year in base pay. (Tr. 177-78). Complainant went on unemployment and did not work at all for the remainder of 2003. (Tr. 180). He was hired as a back-up pilot by one company and also went to work part-time as a consultant for MedRx, a former employer. (Tr. 188-89). In 2003, Complainant earned about \$2,000 from MedRx. In 2004, Complainant was paid \$125 per flight and earned about \$675 as a back-up pilot. He continues to work part-time for MedRx, where he is paid \$10 per hour. (Tr. 189).

Complainant continues to seek aviation work by filling out online applications and sending out resumes. (Tr. 189-90). Since Complainant's discharge by Respondent, he has no medical benefits, no steady income and has fallen into arrears with child support payments. (Tr. 190). He feels stressed out and frustrated with his situation. (Tr. 190-91). Complainant seeks an award of compensatory damages for his non-economic losses. (Tr. 191). He also claims that he was never paid lost wages. (Tr. 216).

Testimony of Terence Haglund

Mr. Haglund is Respondent's vice-president of administration and also serves as Respondent's general counsel. (Tr. 46). The company president is Tom Kolfenbach, and the vice-president/general manager is Tom Balkenhol. (Tr. 111). The vice-president of operations is Ron Burk, and the remaining chain of command on the operations side spans from director of operations to chief pilot to line pilots. (Tr. 111-12). Mr. Haglund makes recommendations as to hiring and firing but does not make the actual decision to hire or fire someone. (Tr. 47-48). No one can be fired without the permission of Respondent's president. According to Mr. Haglund, the company president is the one who decided that Complainant should be suspended and not fired. (Tr. 52). Mr. Haglund had no role in the decision to suspend Complainant in January 2003. (Tr. 48).

According to Mr. Haglund, when Respondent's pilots are ill, they are requested to call in sick as far in advance of a scheduled flight as possible. (Tr. 81). A doctor's note is required if an employee is out for more than a certain number of days or if the director of operations requests one. (Tr. 82). Under federal aviation regulations, pilots must be given a twenty-four consecutive hour time period off in any seven consecutive days. (Tr. 84).

Mr. Haglund testified that other employees complained about Complainant's behavior on the job, particularly that he spent most of his flight time talking about personal issues unrelated to the flight and complaining about things, which was distracting and created a safety issue. (Tr. 98, 103). Mr. Haglund did not know whether

Complainant was ever counseled regarding this behavior. (Tr. 98). The employees also complained about Complainant's lack of professionalism, namely his penchant for wearing costumes in the cockpit and for traveling with a bag that had a stuffed animal hanging out of it. (Tr. 104). In addition, Complainant programmed a four-digit code of all sixes into the transponder even after a captain asked him not to do so. (Tr. 105-06).

Mr. Haglund testified that Ms. Robbins was unhappy about being asked to share information about a conversation with Complainant when Captain Malone asked her for a statement. (Tr. 66). He termed Complainant's comment to Ms. Robbins that he and other pilots did not want to fly with Captain Malone as "a personality issue," rather than a safety issue. (Tr. 86). He acknowledged that it was wrong for Ms. Vogel to have told Captain Malone about the discussion between Ms. Robbins and Complainant and affirmed that she was disciplined for releasing confidential information to a third party. (Tr. 67, 70). According to Mr. Haglund, Ms. Robbins wrote "for safety reasons" in her account of the conversation with Complainant only because Complainant asked her to do so. (Tr. 86-87). Ms. Robbins told Mr. Haglund that it was not true that she discussed safety issues with Complainant and that she was very upset when she realized that Complainant had taken the statement from her desk. (Tr. 86-89). Mr. Haglund denied that Ms. Robbins could have been fired for writing the statement requested by Complainant. (Tr. 93).

Mr. Haglund testified that Captain Lusk made the recommendation to terminate Complainant after Complainant returned from his suspension. (Tr. 67-68). Mr. Haglund explained that Complainant told crew scheduling that he could not fly his scheduled flights, which was "in direct contravention of the agreement reached between [Complainant] and Captain Lusk," so Captain Lusk reported the situation to Mr. Kolfenbach. Mr. Haglund was under the impression that Complainant had flights scheduled immediately. (Tr. 68). The termination took place on February 14, 2004, and Captain Lusk, Mr. Burk and Captain Malone were all present. Mr. Haglund denied that it was Captain Malone's decision to fire Complainant. (Tr. 117). He also denied that Complainant was fired because he made negative comments about Captain Malone. (Tr. 116).

Mr. Haglund was aware that certain employees had called an FAA hotline to make complaints. (Tr. 76). Mr. Haglund testified that Complainant would have been within his rights to make a safety complaint to human resources but that he should have reported it to the director of safety and his supervisor. (Tr. 74-75). Mr. Haglund did not see a problem with the fact that Complainant's supervisor, Captain Lusk, reported to Captain Malone, about whom Complainant had raised the complaint. (Tr. 75).

Testimony of Amy Halisky

Ms. Halisky has worked for Respondent as a flight attendant and then as a crew scheduler since March 2003. (Tr. 225). She was not working in crew scheduling at the time of Complainant's termination. As the current manager of crew scheduling, Ms. Halisky bids scheduled lines of flying each month, on which the pilots and flight attendants bid. (Tr. 226). The schedule for the month is usually issued sometime between the fifteenth and the twenty-fifth day of the previous month. (Tr. 227).

Ms. Halisky testified that it is rare for an employee to tell her that he does not wish to fly with another employee. (Tr. 226). Respondent employs sixty-five pilots at the present time. (Tr. 227). Gregory Ford is the only pilot who has ever told her that he does not wish to fly with Captain Malone. (Tr. 226-27). Ms. Halisky did not know the reasons why Mr. Ford does not want to fly with Captain Malone but was aware that Mr. Ford has some type of legal proceeding pending against Respondent. (Tr. 227).

Testimony of Jessica Bush

Ms. Bush became a crew scheduler for Respondent in July 2002 and was promoted to manager of crew scheduling in March 2003. (Tr. 229). In dealing with Complainant, Ms. Bush was aware that Complainant did not want to work with certain people and that occasionally there were certain days that he was not available to work, although she recalled no specific details. (Tr. 230). Ms. Bush affirmed that it is not unusual for certain pilots to ask not to fly with other pilots. (Tr. 239). She did not recall whether any pilots ever requested not to fly with Complainant. (Tr. 240). She testified that on one occasion, Complainant called in over the radio to get his bids and was upset with his schedule, so he told the crew schedulers that his bid lines "suck[ed]" and accused them of lying to him. (Tr. 241). She affirmed that it could be "economically disruptive" for Respondent to have to work around an employee's other commitments when making the flight schedules. (Tr. 242-43).

Ms. Bush did not know that Complainant had called in sick in December 2002 but testified that the crew schedulers would replace a pilot who called in sick. She never called any sick pilots to tell them that they had to come in and fly anyway, nor did she hear Captain Malone ever telling a sick pilot to come in anyway. (Tr. 244).

When Complainant was brought back from his suspension, Captain Lusk asked Ms. Bush to come up with a schedule for him to start flying the DC-9. (Tr. 231). Captain Lusk did not mention any exceptions or special circumstances in the schedule. (Tr. 212). Ms. Bush testified that the schedule did not have to accommodate the pilots' other plans, and if, for example, Complainant had wanted Wednesdays and Thursdays off, he would have had to bid on a line with that type of schedule. (Tr. 245-26). Ms. Bush prepared the schedule, which was to be effective immediately. (Tr. 234). She

explained that she was able to schedule flights for Complainant on open lines where other pilots had been taken off schedule for training or other reasons. (Tr. 234).

When Complainant came to pick up the schedule, he told Ms. Bush that there were certain days that he could not work due to prior engagements. (Tr. 231-32, 234). Ms. Bush then told Captain Lusk that Complainant had told her that he was unable to work on certain days that he had been scheduled to fly, and he told her he would speak to Complainant about it. (Tr. 233). Ms. Bush never tried to cover those flights with other pilots because she was not asked to do so. (Tr. 236).

Ms. Bush was never asked for a copy of the schedule that she gave to Complainant. (Tr. 234). She did not recall the date that he was first scheduled to fly or whether he was to be flying a DC-9 or an MD-80. (Tr. 245). She was aware of an FAA investigation in February 2003 but did not know anything further about it. (Tr. 237). Ms. Bush did not know why her predecessor, Eric Hansen, was fired from crew scheduling. She occasionally heard Mr. Hansen use profanity in her presence but never heard Complainant use profanity. (Tr. 238). She had no idea why Complainant was terminated. (Tr. 246).

Testimony of Milton Corchado

Mr. Corchado is the acting director of in-flight for Respondent. (Tr. 250). He manages the in-flight department, which includes overseeing the training department and ensuring that flight attendants follow company policies and FAA regulations. (Tr. 250-51). He testified that there is a chain of command involved in the decision to terminate an employee, and Mr. Kolfenbach is always the final authority on any termination decision. (Tr. 270-71).

In September 2002, Mr. Corchado conducted a water survival training class at which Complainant was in attendance, along with a number of other pilots. (Tr. 251, 256). Complainant brought a rubber duck and some sort of surfboard to the class, and Mr. Corchado speculated that he did so in order to get attention. (Tr. 252-53). Complainant refused to take his duck and surfboard out of the pool even after Mr. Corchado asked him to do so. (Tr. 253). Complainant referred to one of the female trainees as a heavy pig. (Tr. 255). Another pilot pushed Mr. Corchado's co-instructor, Kathy Wright, into the pool. (Tr. 254). Mr. Corchado felt that Complainant was being unprofessional and distracting the trainees, and he later contacted the then-director of in-flight to inform her of the situation. (Tr. 252-53, 258). He also spoke to Captain Malone about it. (Tr. 261).

There was heavy rain that day but no lightning. (Tr. 251, 253, 256). Mr. Corchado testified that he would never endanger other people's lives by doing water-based training while there was lightning. (Tr. 254). One flight attendant slipped and hit

his head after the training was over, but Mr. Corchado testified that this incident had nothing to do with the rain and could have happened to “anyone walking anywhere.” (Tr. 259-60). Mr. Corchado denied that he left the injured flight attendant. (Tr. 263).

Mr. Corchado flew with Complainant a few times when he was a flight attendant. Although he never heard anything negative about Complainant, he did hear other pilots say that they did not want to fly with Complainant. (Tr. 266). In Mr. Corchado’s opinion, Complainant had a difficult time following directions both in the water survival training class and while flying. (Tr. 267).

Testimony of Hazel Jean Robbins

Ms. Robbins is Respondent’s director of human resources. (Tr. 276). She does not have any responsibility for Respondent’s compliance with FAA regulations. (Tr. 277). She does not deal with safety issues and would send any employee with such a concern to the safety director. (Tr. 280).

While Complainant was suspended, Ms. Robbins was present for a conversation with Captain Lusk, Captain Malone and Complainant regarding seniority issues. (Tr. 302-03). At that time, Complainant disagreed with Captain Malone’s assertion that suspension time does not count toward an employee’s seniority, but Ms. Robbins did not note any hostility between the two men. (Tr. 303).

Ms. Robbins is unfamiliar with the terms crew resource management and cockpit resource management and never discussed these things with Complainant. (Tr. 278). When Complainant came back from his suspension, he came into Ms. Robbins’ office to have some papers put in his personnel file. He complained to her about various matters and then asked her if she had heard that Captain Malone was going back on the line. Ms. Robbins told Complainant that she had heard, and Complainant then stated that he wished Captain Malone luck because employees did not want to fly with him. Ms. Robbins did not question that statement because she assumed that Complainant made the comment because he did not get along with Captain Malone. (Tr. 279). Complainant spoke to Ms. Robbins for about a half hour, and the portion of the conversation regarding Captain Malone lasted about a minute. (Tr. 281). Complainant never mentioned FAA violations or engaging in protected activity. (Tr. 284-85). It never occurred to Ms. Robbins that Complainant’s comments had anything to do with safety concerns. (Tr. 280).

On February 14, 2003, the day after this conversation, Captain Malone asked Ms. Robbins about her conversation with Complainant and what Complainant had said about him. (Tr. 282-83). Ms. Robbins was upset because the confidentiality of the human resources office had been breached. Captain Malone told her that Mr. Kolfenbach wanted her to write up a report of the conversation, regardless of her confidentiality concerns. (Tr. 283). Ms. Robbins recounted the entire conversation in this document,

leaving nothing out. (Tr. 283-84). She passed the document along to Mr. Balkenhol and did not know whether Captain Malone ever saw the document. (Tr. 285). Later that day, Ms. Robbins was also asked to write another report for Mr. Haglund, detailing what had occurred when Complainant was in her office. (Tr. 288-89, 329-30). She explained that this document was a more complete version of the conversation between herself and Complainant. (Tr. 326-28).

After preparing the document, Ms. Robbins figured out that her assistant in human resources, Ms. Vogel, had overheard the conversation with Complainant and had reported it to Captain Malone. (Tr. 287-88). Ms. Vogel initially denied that she had told Captain Malone about the conversation but eventually told Ms. Robbins the truth. (Tr. 299, 318).

About three or four weeks after this incident occurred, Complainant came to Ms. Robbins' office and asked her for a copy of the document she had written for Captain Malone. (Tr. 291-92). When she told him that she did not have a copy, Complainant asked to her write down what she could remember and then told her not to forget that it was a safety issue. (Tr. 292). Although Ms. Robbins wrote that down, she immediately told Complainant that their conversation had nothing to do with safety and that she could not give him the document. (Tr. 292-93).

Ms. Robbins left her office and returned and started working on something else, but after Complainant left, she realized that she did not have the document. (Tr. 293-94). Ms. Robbins then told Mr. Haglund what had happened. (Tr. 294-95). She affirmed that she never gave Complainant permission to take that document and that any reference to a discussion about safety concerns was not true. (Tr. 295). Ms. Robbins never intended to be untruthful or dishonest and explained that her mind was on other things and she was not paying attention to what she was doing when Complainant asked her to write "for safety reasons." (Tr. 295-96, 310, 324).

Ms. Robbins testified that Captain Malone had no authority to fire her, and she did not feel that her job was in jeopardy when Captain Malone asked her to write out the statement in question, nor has she ever felt threatened or coerced since that time. (Tr. 285-86). Ms. Robbins also was not under duress when she wrote the report for Mr. Haglund. (Tr. 289). She explained that when she stated in this report that she wrote the statement for Captain Malone "under pressure," she meant that she was concerned that the confidential conversation had come out of her office and that she would not have reported the confidential information if she had not been asked to do so. (Tr. 290).

Ms. Robbins was unaware of any FAA investigation involving Respondent or any allegations against Captain Malone. (Tr. 310-11). She speculated that Captain Malone decided to step down as director of operations and return to flying because of all the paperwork involved in being the director of operations. (Tr. 311-12).

Testimony of Vicky Vogel

Ms. Vogel was employed by Respondent from December 2001 until August 2003. (Tr. 335-36). For two of those months, she worked as a human resources assistant, and her work area was located next to Ms. Robbins' office. (Tr. 336). She overheard the conversation between Complainant and Ms. Robbins and testified that Complainant was making "personal attacks" on Captain Malone. (Tr. 337-38). She did not remember exactly what Complainant said, other than telling Ms. Robbins that he and other people did not like Captain Malone and that he did not want to fly with him. (Tr. 338, 351). She did not recall hearing Complainant say anything about safety issues or violations of FAA regulations. (Tr. 338-39). She never heard Complainant use the terms cockpit resource management or crew resource management. (Tr. 341). Ms. Vogel did not know anything about Complainant's suspension, nor did she hear Complainant mention anything about his suspension during the conversation. (Tr. 349).

Later that day, Ms. Vogel ran into Captain Malone. (Tr. 339-40). She told Captain Malone that Complainant had told Ms. Robbins that he did not like him. (Tr. 340-41). Ms. Vogel testified that Captain Malone seemed depressed but calm. He told her that if Complainant did not like him, it was because Complainant complained a lot on their trips and Captain Malone "didn't want to hear it and . . . felt it was distracting to his work." (Tr. 345). Ms. Vogel was unaware that Captain Malone was stepping down as director of operations and did not know about any FAA investigation involving Captain Malone. (Tr. 349).

Ms. Vogel acknowledged that she initially lied to Ms. Robbins when asked if she had told Captain Malone about the conversation. (Tr. 343). She later received reprimands from Ms. Robbins and Mr. Haglund for telling Captain Malone about the conversation, and she understood that it was a breach of protocol to have told him. (Tr. 341).

Testimony of Steven Malone

Captain Malone began working for Respondent as a DC-9 captain nearly four years ago and was promoted to director of operations in June or July 2002. (Tr. 354). As director of operations, Captain Malone reported to the general manager of the company, served as liaison between Respondent and the FAA and supervised the chief pilot, director of training, director of in-flight and the manuals technician. He also reviewed and changed policies and procedures and ensured that the manuals were updated. In addition, Captain Malone was responsible for compliance with FAA regulations. (Tr. 357). He explained that under FAA guidelines, Respondent's pilots can work six days on and then have twenty-four hours duty-free. (Tr. 359). If a pilot has worked for less than six days and then has scheduled days off, he can still be called in as long as he is within the FAA time limit for days on. (Tr. 437). He denied ever telling Complainant or any

other pilots that they had to work as many days as the company needed them without time off. (Tr. 359-60). He was unaware of any written complaints against him during his tenure as director of operations. (Tr. 393-94). As director of operations, Captain Malone had the right to recommend that pilots be fired but had no right to fire them himself. (Tr. 394-95).

In September 2002, one of Respondent's pilots refused to take off at 108,000 pounds, and Captain Malone told him that if he did not fly the plane, he would be replaced. (Tr. 400). Captain Malone explained that when the plane was built, it was rated to take off at 108,000 pounds, and Respondent was in the process of getting approval to increase the gross weight to 108,000 pounds when the incident in question occurred. (Tr. 401-02). He affirmed that the pilot in question contacted the FAA, who contacted Respondent, but he denied that there was any FAA investigation of the matter. (Tr. 404-05).

Before his promotion, Captain Malone flew with Complainant on many occasions. In his opinion, Complainant was an average pilot but was very immature. For example, Complainant would carry a flight bag with a dead chicken hanging out of it and wore bunny ears and reindeer antlers on his head during holiday seasons. (Tr. 355). He also programmed the number "666" into the transponder on the airplane even after one of the captains asked him to stop doing so. (Tr. 372-73). In addition, other employees felt that Complainant complained too much, which was disruptive. (Tr. 355-56). For example, Complainant would ask the flight attendants to make him iced tea and fill it up to a precise line in his mug, and he would return the mug if they failed to do so. (Tr. 356). In another incident in the fall of 2002, Complainant complained over the radio that Respondent had tricked him about something and that it "suck[ed]." (Tr. 361). Captain Malone testified that this type of language was improper by both company standards and by FAA standards. (Tr. 362).

Complainant also caused problems at a water survival training class when he and other pilots engaged in distracting behavior and Complainant referred to some flight attendants as fat pigs. (Tr. 365-67). Complainant also sold ties and shirts with the company logo on them even after he had been asked to stop producing and selling these items. (Tr. 370-31). Captain Malone agreed that Complainant had a problem with following instructions and was a complainer. (Tr. 371, 393). However, he never expressed a preference not to fly with Complainant and denied any personality conflict between himself and Complainant. (Tr. 411).

In December 2002, Captain Malone began receiving reports from crew scheduling about Complainant's refusal to answer his phone on reserve days as well as his claims that he was too ill to fly. (Tr. 357-58). Captain Malone explained that Complainant would be out for several days and no one could reach him. (Tr. 358). When Complainant was asked to provide a doctor's excuse, he did not do so in a timely manner.

(Tr. 358-59). On December 18, 2002, Captain Malone told Complainant that if he did not take a flight the next day, he would be fired. (Tr. 412). He explained that Complainant was on a trip to pick up a plane, and when the plane was not ready, Complainant kept calling crew scheduling and claiming that he was sick and did not know if he could complete the trip from Fort Lauderdale to New York and back as assigned. (Tr. 412-13). When Complainant would not give him a definite answer as to whether or not he was too sick to fly, Captain Malone became frustrated with Complainant and threatened to fire him if he did not take the trip. (Tr. 414). Captain Malone immediately retracted his statement but again asked Complainant to tell him whether he was sick or not. (Tr. 414). Captain Malone affirmed that he eventually received a doctor's note from Complainant but did not know how long Complainant had the note. (Tr. 415-16). Captain Malone did not know why Complainant was taken off schedule on December 28, 2002. (Tr. 417).

On January 2, 2003, Complainant was suspended by Captain Lusk. (Tr. 362). Leading up to that point, both Captain Lusk and Captain Malone had received complaints from pilots and flight attendants who did not want to fly with Complainant because of his disruptive behavior. (Tr. 363, 421). These problems had been discussed with Complainant as well. (Tr. 363). Captain Malone denied that Complainant was suspended for being sick. (Tr. 421). Captain Malone testified that he talked Captain Lusk out of firing Complainant outright, although the ultimate decision to suspend Complainant rested with Captain Lusk. (Tr. 364). When Complainant was suspended, he signed a document agreeing to follow company procedures. As per the document, Complainant was to be on probation for the next six months. (Tr. 369). Captain Malone denied any knowledge of whether Mr. Haseltine conducted an FAA investigation into Complainant's suspension and testified that Mr. Haseltine never raised any concerns about the suspension to him. (Tr. 405, 409).

After thirty days, Respondent made the decision to bring Complainant back from his suspension. (Tr. 369-70). Complainant met with Captain Lusk to discuss the terms of his return, and Captain Malone had no knowledge of those conditions until after fact. (Tr. 375-77). Captain Malone did not know if Complainant was taking classes to be requalified when he returned. (Tr. 396-97). He denied telling Complainant that he knew who was talking to the FAA and that those people would be fired and sued for defamation. (Tr. 405-06). On February 13, 2003, Complainant, Captain Lusk and Captain Malone met in Ms. Robbins' office to sort out a payroll issue. (Tr. 397). Captain Malone explained to Complainant that his seniority was to be adjusted based on the time he had missed during his suspension. (Tr. 397-98).

On February 14, 2003, Complainant was terminated. (Tr. 379). According to Captain Malone, Complainant had been scheduled to fly a trip that Thursday. Complainant told the crew schedulers that he could not do the trip and that he needed to have that night off as well as weekends off. (Tr. 380). Captain Malone could not

imagine that Captain Lusk would have told Complainant that he had permission to tell the crew schedulers to work around his other commitments. (Tr. 382-83).

Complainant then went to human resources and made negative comments about Captain Malone, who learned of these comments from Ms. Vogel. (Tr. 380). He acknowledged that he was angry at Complainant for saying those things but had no knowledge of any sort of safety issue being implicated in Complainant's comments about him. (Tr. 385, 389). In Captain Malone's opinion, complaining is against company policy. (Tr. 393). He explained that although Respondent has no company policy against complaining, complaining on the job is disruptive and takes away one's ability to fly the plane. (Tr. 455-56). Captain Malone did not feel that Ms. Vogel had breached any protocol by telling him about the conversation that she overheard. (Tr. 427). At any rate, he called Complainant that night and asked him to bring his identification, wings and manuals to the office the next morning. (Tr. 398).

Captain Malone, Captain Lusk and Mr. Burk discussed the situation and determined that Complainant should be terminated. (Tr. 380, 386). Their concern was that Complainant had just agreed to follow procedures and stop being disruptive and had then gone back to his old ways. (Tr. 386). Captain Malone asked Ms. Robbins to write a letter about her conversation with Complainant, and the letter was passed up to Mr. Kolfenbach, who made the ultimate decision to discharge Complainant. (Tr. 380, 386, 446). Complainant then met with Captain Malone, Captain Lusk and Mr. Burk. Captain Malone told Complainant that he had the option to resign or be terminated. Complainant asked questions about why he was being fired, but Captain Malone could not discuss the reasons with him, as per Mr. Balkenhol's orders. (Tr. 387). He testified, however, that Complainant was not terminated because he was a complainer. (Tr. 394).

On the same day that Complainant was terminated, Captain Malone stepped down as director of operations to return to flying. (Tr. 377-79). His decision had nothing to do with any problems with the FAA. (Tr. 379). Captain Malone continues to work for Respondent as a line captain and is unaware of any pilots of who do not want to fly with him. (Tr. 436).

Deposition of Bruce Haseltine

Mr. Haseltine works for the FAA as the principal operations inspector (POI) for Respondent. (CX. 22, p. 4). He was somewhat aware of allegations that Respondent flew planes overweight and violated pilot duty times before he became their POI. (CX. 22, pp. 17-20). Mr. Haseltine testified that in December 2002, there were many allegations against Captain Malone because he was the director of operations when violations had been filed against Respondent. (CX. 22, pp. 44, 46). According to Mr. Haseltine, Captain Malone was formerly a check airman with FAA authority to do various pilot checks, but he was removed from that position when he was found in

violation of FAA regulations. (CX. 22, pp. 38-39). Mr. Haseltine affirmed that some pilots did not want to fly with Captain Malone. (CX. 22, pp. 41-42). He acknowledged that if he was a pilot, he might not want to fly with Captain Malone. (CX. 22, p. 29).

Mr. Haseltine was aware that Complainant was suspended before he was fired and that Complainant alleged that he had been required to fly ill. (CX. 22, p. 13). Mr. Haseltine told Captain Malone that he did not want airmen flying ill because it was an FAA violation. (CX. 22, p. 24). He noted that Complainant also would have been in violation of FAA regulations had he flown ill. (CX. 22, pp. 22, 24). He also spoke with Mr. Kolfenbach about Complainant's allegation that he was required to fly ill, but Mr. Kolfenbach explained that Complainant was not suspended for that reason but for unrelated problems. (CX. 22, pp. 13-14). Mr. Kolfenbach also expressed his hope that Complainant would return to the line as soon as possible. (CX. 22, p. 14). Mr. Haseltine affirmed that Respondent needed pilots in February 2003 because certain pilots had gone over their duty time and were grounded. (CX. 22, p. 27). He agreed that Captain Malone was in some way responsible for these violations. (CX. 22, p. 28).

After Complainant was terminated, he called Mr. Haseltine on several occasions and alleged that his refusal to fly sick was the reason for his termination. (CX. 22, p. 9). Complainant also told Mr. Haseltine that he had been terminated because he had said things about Captain Malone that had been repeated to Captain Malone. (CX. 22, pp. 14-15). Mr. Haseltine sent Respondent the standard letter of investigation to give the company an opportunity to respond. (CX. 22, p. 9). He received a response stating that Respondent had not flown an airman ill. (CX. 22, p. 10). Mr. Haseltine also received a copy of a letter written by Captain Rodney Conover, who flew with Complainant on the flight in question and denied that Complainant appeared to be ill or claimed to be ill. (CX. 22, pp. 53-54). Mr. Haseltine acknowledged that Captain Conover would have a vested interest in denying that Complainant flew sick because he would have also been in violation of FAA regulations if he flew with a sick first officer. (CX. 22, p. 35).

Mr. Haseltine also spoke to Captain Lusk about the situation because he was the director of operations. (CX. 22, pp. 11-13). Captain Lusk told Mr. Haseltine that Complainant was terminated for bad-mouthing Captain Malone. (CX. 22, p. 15). Mr. Haseltine did not speak with Captain Malone because he was no longer the director of operations at that time. (CX. 22, pp. 11-13). On September 24, 2003, Mr. Haseltine wrote to Mr. Kolfenbach to inform him that the investigation had not established a violation of FAA regulations and that the matter had been closed. (CX. 22, pp. 54-55).

Deposition of David Lusk

Captain Lusk is an aviation safety inspector with the FAA. (RX. 12, p. 2). He was formerly employed by Respondent as a line captain, chief pilot and finally director of operations. (RX. 12, p. 6). He left the company to work for the FAA because of the

opportunity to relocate to Hawaii and the security of a government job. (RX. 12, p. 7). His departure had nothing to do with Complainant. (RX. 12, pp. 7-8).

As a line captain, Captain Lusk flew with Complainant on approximately ten occasions. (RX. 12, p. 8). He testified that whenever he had to work with Complainant, he knew that he would have to listen to Complainant's "barrage of complaints" about the corporate leadership, the lack of days off and the lack of firm scheduling, "which didn't make for a pleasant situation." (RX. 12, pp. 8-9). Complainant never discussed safety issues or flight and duty time regulations; rather, he complained about his personal issues with the flight schedule. (RX. 12, p. 9). Every time that Complainant's schedule got changed, he would say that he was being lied to, and on one occasion, he told a scheduler over the radio that something "really suck[ed]," which Captain Lusk felt was improper and unprofessional. (RX. 12, pp. 17, 22). The crew schedulers often complained about their dealings with Complainant. (RX. 12, pp. 23-24). Captain Lusk counseled Complainant on occasion about his difficulties with crew scheduling. (RX. 12, p. 118).

Captain Lusk testified that Complainant filed expense reports for lost income if he was called in to fly and missed refereeing a hockey game, even though he made more money if he was working as a pilot. (RX. 12, pp. 20-21). Captain Lusk also felt that Complainant showed poor judgment as a pilot. (RX. 12, p. 14). In one instance, when the crew was concerned with flight and duty time, Complainant suggested entering a holding pattern to see a space shuttle launch even though doing so would place the crew in danger of violating FAA regulations. (RX. 12, pp. 10-14). However, no pilots ever refused to fly with Complainant or related safety concerns about Complainant. (RX. 12, pp. 76-77).

At a certain point after becoming chief pilot, Captain Lusk began to feel that Complainant should be terminated because "he was not good for the company and the company was not good for him." (RX. 12, pp. 24-25). In late December 2002 or early January 2003, he told Captain Malone that he thought Complainant should be fired, but there was no discussion of safety issues or protected activity. (RX. 12, pp. 25-27). Captain Malone told Captain Lusk that he would pass along his recommendation to Mr. Kolfenbach, and the decision was made to suspend Complainant for sixty days without pay. (RX. 12, pp. 27-28).

Captain Lusk met with Complainant on January 2, 2003, to discuss the suspension. He prepared a letter which stated the reasons for the suspension as well as the terms and conditions of it. (RX. 12, p. 30). One of the reasons for the suspension was Complainant's lack of proper documentation from a doctor for his illness. (RX. 12, pp. 30-32). Captain Lusk denied that Complainant was suspended because he called in sick. (RX. 12, p. 32). The other reasons cited for the suspension included lack of cooperation with crew scheduling, use of inappropriate language on the company radio in October 2002 and poor working attitude with other crew members. (RX. 12, pp. 32-34).

Complainant was suspended until March 2, 2003, at which time he would be returned under a six-month probation. (RX. 12, p. 34).

After about a month, Respondent decided to bring Complainant back because he had been very quiet since his suspension and because more pilots were needed on the line. (RX. 12, pp. 35-36). When Complainant came back, he met with Captain Lusk to reiterate the issues which had led to his suspension. (RX. 12, pp. 36-37). Complainant appeared to understand and agree with Captain Lusk. (RX. 12, p. 37). Captain Lusk told Complainant to go to crew scheduling and get a schedule. Complainant told Captain Lusk that he already had scheduled hockey games to referee, and Captain Lusk told Complainant that if he wanted to come back, he needed to work within Respondent's schedule. Complainant agreed to do so. (RX. 12, p. 38). Captain Lusk denied that he gave Complainant permission to tell Ms. Bush to work around his hockey games. (RX. 12, p. 39). Nonetheless, Complainant told Ms. Bush that she needed to work around his prior commitments. (RX. 12, p. 40).

Captain Lusk felt that based upon this incident and Complainant's prior difficulties, he should be terminated. (RX. 12, p. 42). Within a day or two, Captain Malone told Captain Lusk that the decision had been made to terminate Complainant because of the crew scheduling incident and the fact that Complainant had been bad-mouthing people, which were viewed as violations of his probation. (RX. 12, p. 43). There was never any discussion of Complainant having engaged in protected activity. (RX. 12, pp. 45-46). Captain Lusk was aware of the substance of Complainant's comments about Captain Malone, and he did not feel that these comments had anything to do with raising a safety issue. (RX. 12, pp. 46-47). He testified that he was unaware of Complainant ever raising a safety issue with the company and that Complainant's termination was not an act of retaliation against him for raising a safety issue. (RX. 12, pp. 47-48).

CREDIBILITY FINDINGS

The Court has considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, the Court has taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., Frady v. Tennessee Valley Auth., 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995 (citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3d Cir. 1979)); Indiana Metal Products v. National Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony but may choose to believe only certain portions of the testimony. See Altemose Constr. Co. v. National Labor Relations Bd., 514 F.2d 8, 15 n.5 (3d Cir. 1975).

The credibility findings are based upon a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been giving to the testimony of all witnesses found to be credible. I found Terry Haglund, Amy Halisky, Jessica Bush, Jean Robbins, Vicky Vogel and Steven Malone to be very credible witnesses. The Court was left with no doubt that Ms. Robbins testimony was truthful. It must be noted that there are several discrepancies between the testimony of Ms. Bush, Ms. Robbins, Ms. Vogel and Captain Malone and Complainant's own version of the events leading up to his termination. Although the Court did not observe Captain Lusk testify, the Court notes the discrepancy between Captain Lusk's testimony and Complainant's testimony concerning crew scheduling and Complainant's personal schedule. Captain Lusk's version is supported by Ms. Bush's actions and the circumstances surrounding Complainant's suspension and recall to duty.

In particular, I note that Ms. Robbins' and Ms. Vogel's testimony regarding the events of February 13, 2003, is very different than the version given by Complainant. Likewise, Ms. Bush's account of the crew scheduling conversation on that day contradicts Complainant's account. Finally, Captain Malone's testimony regarding Complainant's sick days in December 2002 exposes more inconsistencies in Complainant's testimony. Since Ms. Robbins, Ms. Vogel, Ms. Bush and Captain Malone were each credible witnesses, Complainant's general credibility as a witness has been called into question by the various inconsistencies between his testimony and the testimony of these four credible witnesses. Accordingly, I find that Complainant's testimony is only partially credible and is entitled to less probative weight.

LAW AND CONTENTIONS

AIR21 states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee: 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 2) filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 3) testified or is about to testify in such a proceeding; or 4) assisted or participated or is about to assist or participate in such a proceeding. 29 C.F.R. § 1979.102.

Under 49 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR21, a complainant must prove by a preponderance of the evidence that an activity protected

under AIR21 was a contributing factor in the unfavorable personnel action alleged in the complaint. Courts have defined “contributing factor” as “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action. Marano v. United States Dep’t of Justice, 2 F.3d 1137 (Fed. Cir. 1993). The activities protected under 49 U.S.C. § 42121(a)(1) include reports of information to an employer or the Federal Government of a violation of a Federal law or FAA regulation, standard or order relating to air carrier safety. Based on these principles, to establish a violation of AIR21, a complainant must prove three elements: 1) protected activity; 2) unfavorable personnel action; 3) causation in terms of contributing factor. Each of these elements will be examined in turn to determine whether Complainant has established that Respondent committed an AIR21 violation.

Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, United States Department of Labor, has broadly defined “protected activity” as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.” Minard v. Nerco Delamar Co., 92-SWD-2 (Sec’y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. American Nuclear Resources v. United States Dep’t of Labor, 143 F.3d 1292 (6th Cir. 1998), citing Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant’s concern must at least “touch on” the subject matter of the related statute. Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec’y Feb. 1, 1995), slip op. at 8-9, and Dodd v. Polysar Latex, 88-SWD-4 (Sec’y Sept. 22, 1994). Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. Kesterton v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997).

A protected activity under AIR21 has three components. First, the report or action must involve a purposed violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least “touch on” air carrier safety. Second, the complainant’s belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer or the Federal Government. 49 U.S.C. § 42121(a)(1).

The December Suspension

I find that Complainant did not engage in protected activity in December 2002. I find Captain Malone’s testimony to be substantially more credible than that of Complainant concerning the events in December 2002. Although Complainant *said* he

was sick, he was being very dodgy about it and would not give Captain Malone a definite answer as to whether he was too sick to fly. Captain Malone just needed a clear answer from Complainant on whether he was able to fly but Complainant persisted in being difficult. Captain Conover, who flew with Complainant on the flight in question, denied that Complainant appeared to be ill or claimed to be ill. While refusing to fly because of illness can be protected activity, I find that Complainant never communicated to Respondent that he was too ill to fly.

The February Termination

I find that Complainant did not engage in protected activity in February 2003. The Court simply did not find Complainant's version of the events to be credible. Complainant asserts he expressed safety concerns to Ms. Robbins, the director of *Human Resources* who has no responsibility for compliance with FAA regulations or safety issues. However, according to the credible testimony of Ms. Robbins and Ms. Vogel, Complainant's comments did not have anything to do with safety. Although Complainant mentioned that employees did not want to fly with Captain Malone, the Court finds, as Ms. Robbins understood the comment, that Complainant made the comment because he did not get along with Captain Malone and the comment had nothing to do with any safety concern.

Unfavorable Personnel Action

There is no doubt that Complainant sustained the ultimate unfavorable personnel action when he was terminated on February 14, 2003, following a January 2, 2003 suspension.

Protected Activity as Contributing Factor in Adverse Employment Action

To establish discrimination under AIR21, Complainant must also prove by a preponderance of the evidence a connection between his protected activity and the unfavorable personnel action. As there is no evidence of protected activity, I need not reach this issue.

CONCLUSION

Complainant having failed to establish that he engaged in protected activity, I hereby dismiss his complaint with prejudice.

ORDER

The complaint of Nick Rougas is hereby **DISMISSED**.

So **ORDERED**.

A

LARRY W. PRICE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).